In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH, PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The complaint in this case charged that respondents have been monopolizing, and conspiring and attempting to monopolize, commerce among the States in the business of professional football, and conspiring thereby to restrain such commerce, in violation of Sections 1 and 2 of the Sherman Act (R. 9). It was further alleged that the various team members of respondent National Football League play one another in metropolitan centers throughout the United States; that before the opening of the season they make contracts for the interstate broadcasting and televising of these games; and that such contracts "are part of the business of professional football itself", and without the monies derived therefrom the

business would not be profitable (R. 7–8). Respondents' violation of the statute injured petitioner, it was alleged, by excluding him from the business of organized professional football (R. 10–16). The relief sought was treble damages and an injunction against further violation (R. 16–17).

Following the decision in *Toolson* v. *New York Yankees*, 346 U. S. 356, the District Court (N. D. Cal.) dismissed the complaint on the ground that it failed to state a cause of action (R. 62–64). The Court of Appeals, regarding the case as governed by *Toolson* and the *Federal Baseball Club* case (259 U. S. 200), rather than *United States* v. *International Boxing Club*, 348 U. S. 236, affirmed the judgment of dismissal (Pet. iii–v). It held that football, being a "team sport," was more like the business of baseball than the business of boxing. The court also held that the complaint did not state a claim because the facts alleged did not show that respondents' conduct "was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce" (*id.*, v).

The Government believes that the decision below is in conflict with this Court's decision in *International Boxing*, and that the petition presents a question of public importance which this Court should resolve, namely, whether all businesses involving team contests are beyond the purview of the Sherman Act.

In *United States* v. *Shubert*, 348 U. S. 222, 230, this Court said that "*Toolson* was a narrow application of the rule of *stare decisis*." The Court explained that in *Toolson* it had been confronted with "a unique

combination of circumstances", in that the decision in *Federal Baseball* had specifically fixed the status of the baseball business under the antitrust laws, that during a period of over 30 years the baseball business had grown and developed in reliance on this decision, and that Congress, although actively considering the decision, had not seen fit to enact amendatory legislation. *Id.* at 229. Accordingly, in the *Shubert* and *International Boxing* cases the Court held that *stare decisis*, as applied in *Toolson*, did not go beyond the business of organized baseball and did not embrace either "all businesses built around the live presentation of local exhibitions", as contended by the *Shubert* defendants, or all "exhibitions of an athletic nature", as contended by the *International Boxing* defendants. See 348 U. S. at 242.

We submit that the court below plainly erred in holding that all "team sports" are within the *stare decisis* rule as applied in *Toolson*. The holding in *International Boxing* that the business of promoting championship boxing contests is not governed by *Federal Baseball* and *Toolson* was not based on any differentiation between a business involving contests between teams and a business involving contests between individuals. Moreover, Mr. Justice Frankfurter's dissent viewed the decision in *International Boxing* as granting to baseball an exemption from the Sherman Act denied to "every other sport" (348 U. S. at 250), "whether boxing or football or tennis" (*id.* at 248).

In *International Boxing* the Court held that, if it were not for *Federal Baseball* and *Toolson*, it would

be "too clear for dispute" that the allegations of the complaint brought the defendants within the scope of the Sherman Act. 348 U. S. at 240–241. The allegations viewed as having this effect were that the defendants' business involved promoting "contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission." *Id.* at 240. Since the complaint in the instant case makes like allegations (*supra*, p. 1), it is clear that, apart from *Federal Baseball* and *Toolson*, respondents' business also comes under the Act.

The second ground for affirmance given by the court below appears to be a holding that the complaint was insufficient because it did not show that the statutory violations which it sets forth prejudice the public. But the complaint specifically alleged that respondents have been monopolizing, and attempting and conspiring to monopolize, an interstate business. "Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader' ", they include "every essential to show a violation of the Sherman Act", and, on motion to dismiss, are sufficient. *United States* v. *Employing Plasterers Assn*, 347 U. S. 186, 188–189. The holding by the court below that petitioner was required to show not only that respondents had engaged in conduct which Congress has declared to be illegal, but also that their conduct was to the prejudice of the public, writes into the statute a limitation on its prohibitions not warranted by its language or by the decisions of this Court. The Sherman Act, the Court said in an early

case, "is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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